MASTIKA JAYA TIMBER SDN BHD A

v.

SHANKAR RAM POHUMALL (NO 2)

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU JC
[SUIT NO: 22-229-2009-I]
29 MARCH 2010

CIVIL PROCEDURE: *Striking out - Application for - Prayers in striking out application repeated in setting aside application - Court allowed setting aside but dismissed prayers on striking out on basis of duplicity - Striking out prayer not adjudged in the proceeding - Whether matter was res judicata* C

LEGAL PROFESSION: *Advocates and solicitors - Remuneration - Counsel's fees - Whether an agreement in respect of fees payable to an advocate must be in writing in order to be valid - Plaintiff relying on a collateral oral agreement - Whether such agreement invalid under s. 15 of the Advocates Ordinance (Cap 110) (Sarawak) - Whether evidence of such oral agreement barred under s. 92(d) of the Evidence Act 1950* D E

LEGAL PROFESSION: *Advocates and solicitors - Retainer - Written retainer - Whether oral agreement could contradict written retainer - Whether oral agreement invalid under s. 15 of the Advocates Ordinance (Cap 110) (Sarawak) - Whether evidence of such oral agreement barred under s. 92(d) of the Evidence Act 1950* F

This was the defendant's application to strike out the plaintiff's suit under O. 32 r. 1, O. 18 r. 19, O. 19 r. 7(1), O. 92 r. 4, O. 14A Rules of the High Court 1980. The defendant was a partner in the law firm that represented the plaintiff in another suit. The plaintiff's claim in that suit was for the sum of RM795,903.73 against their erstwhile business associates. However, the plaintiffs failed to obtain an interlocutory injunction. This instant suit was by the plaintiff against their own solicitor for (i) refund of the retainer fee of RM200,000 paid and (ii) recovery of the amounts claimed against their former business associates. The plaintiff pleaded that there was an oral contract that the defendant would refund the retainer fee of RM200,000 if he was unsuccessful in obtaining the interlocutory injunction that they sought. After the writ was served by the plaintiff, the defendant filed this application to strike out the claim. Before the application was heard, the plaintiff entered default judgment against the defendant for failure to file the statement of defence. The defendant filed an application (encl. 29) to set aside G H I

the judgment in default and repeated the prayers and grounds for striking out the writ of summons and statement of claim in the setting aside application. The Judicial Commissioner hearing the application was of the view that the inclusion of the striking out prayer in the setting aside application amounted to duplicity of proceedings. In view of the Judicial Commissioner's finding, the plaintiff argued that the instant striking out application was thus *res judicata*.

Held (allowing defendant's application with costs):

(1) The judgment of the Judicial Commissioner led to the irresistible conclusion that the prayers sought in this application were not adjudicated. The JC found that there was a duplicity of proceedings and therefore dismissed the striking out prayer. The JC had declined to adjudicate on the striking out prayer. The striking out prayer was therefore not adjudged in that proceeding. In the premises, there was no justification for the argument that the matter was *res judicata*. (para 7)

(2) Section 15 of the Advocates Ordinance (Cap 110) (Sarawak) ('Ordinance') enacts that an agreement in respect of fees payable to an advocate must be in writing in order to be valid. In the instant case, the written retainer (SR-1) exhibited by the defendant in the affidavit in support, was evidence of such an agreement. However, the plaintiff was relying on a collateral oral agreement which was invalid under s. 15. Section 92(d) of the Evidence Act 1950 bars the admission of oral evidence to contradict an agreement that is required by law to be in writing. Since s. 15 of the said Ordinance provides that agreement in respect of fees between a client and an advocate must be in writing, no useful purpose would be served by allowing the plaintiff to go to full trial and attempt to adduce evidence of the oral contract. (para 12)

(3) Under s. 112 of the Legal Profession Act 1976, no advocate shall enter into any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding. There is no similar provision in the Sarawak Advocate Ordinance. However, the common law definition of champerty includes such agreements. As a champertous agreement, the alleged oral agreement was illegal and against public policy. Therefore, the plaintiff in this case could not maintain this action. (para 14)

(4) Regarding the plaintiff's claim for the sum of RM795,903.73 against their former business associates, the interlocutory injunction by the application by the plaintiff had been dismissed. However, the suit itself was pending. The plaintiff had alleged professional incompetence against the defendant. Even if for sake of argument, incompetence was proved against the defendant, the claim was premature and speculative as the said suit was still pending. It would also amount to a double claim on the part of the plaintiff. (para 15)

Case(s) referred to:

Aratra Potato Co Ltd v. Taylor Joynson Garrett (a firm) [1995] 4 All ER 695 ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Mokhtar Ngah & Co lwn. Yee Seng Plantations Sdn Bhd [2009] 10 CLJ 348 HC ***(refd)***

Otech Pakistan Pvt Ltd v. Clough Engineering Ltd And Another [2007] 1 SLR 9 ***(refd)***

Quill Construction Sdn Bhd v. Tan Hor Teng & Anor [2006] 2 CLJ 358 HC ***(refd)***

Re Attorney And Solicitor Act 1870, [1875] CH 573 ***(refd)***

Wallersteiner v. Moir (No 2) [1975] QB 373 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 92(d)

Legal Profession Act 1976, s. 112

Rules of the High Court 1980, O. 14A, O. 18 r. 19, O. 19 r. 7(1), O. 32 r. 1, O. 92 r. 4

Advocates Ordinance (Sarawak), s. 15

For the plaintiff - Lim Heng Choo (Anthony Tai with him); M/s Lim & Lim Advocates

For the defendant - Sunny Si; M/s Si & Associates

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an application by the defendant to strike out the suit of the plaintiff under O. 32 r. 1, O. 18 r. 19, O. 19 r. 7(1), O. 92 r. 4, O. 14A Rules of the High Court, 1980.

A **Brief Facts**

[2] The defendant is a partner in the law firm of Messrs. Thomas, Shankar Ram & Co Advocates. The said law firm represented the plaintiff in another case (Suit No. 22-133-2009-I). The plaintiff herein was the 3rd plaintiff in that suit. One Jeffrey B Law, a director of the plaintiff and his wife were the 1st and 2nd plaintiffs. They had sued their Chinese partners over some joint venture deal which had gone sour. I shall not go over the details of that suit save to say that the plaintiffs in Suit No. 22-133-2009-I had sought an urgent injunctive order against their erstwhile C business associates. The plaintiffs' claim in that suit was for the sum of RM795,903.73. At the initial stage, the plaintiffs were successful in their *ex parte* application for injunction. Later they also obtained an ad-interim injunction. However when the *inter parte* injunction application was finally adjudicated, the plaintiffs failed to D obtain the interlocutory injunction. According to the defendant, the plaintiffs blamed him for the loss. It is not in dispute that the plaintiffs had paid the defendant retainer fee of RM200,000. This instant suit is by the 3rd plaintiff (Mastika Jaya Timber Sdn Bhd) in Suit No. 22-133-2009-I against their own solicitor for:

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1. Refund of the retainer fee of RM200,000.

2. The sum of RM795,903.73 which the plaintiff had claimed in Suit No. 22-133-2009-I against their former business associates.

F **[3]** In addition, the plaintiff is also claiming general, aggravated and exemplary damages, interest and costs. The basis of the plaintiff's claim for a refund of the retainer fee is as follows. The plaintiff pleaded that there was an oral contract that the defendant would refund the retainer fee of RM200,000 if he was unsuccessful in obtaining the interlocutory injunction that they sought. In G respect of the other claims, the plaintiff pleaded that the defendant was incompetent and unprofessional in his work in that he had made uncharitable remarks about the judge who dismissed the injunction application, attacked opposing lawyers in affidavits and had also engaged a Singapore lawyer without his consent and in H breach of the law relating to legal practice in Sarawak.

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Preliminary Issue

[4] Counsel for plaintiff submitted that the striking out application (encl. 7) should not be dismissed outright because of the principle of *res judicata*. The *res judicata* argument arose in this way. After the writ was served by the plaintiff, the defendant filed this application to strike out the claim. Before the application was heard, the plaintiff entered default judgment against the defendant for failure to file the statement of defence. The defendant filed an application (encl. 29) to set aside the judgment in default. The defendant repeated the prayers and grounds for striking out the writ of summons and statement of claim in the setting aside application. As the *res judicata* argument is based on the decision of the learned judicial commissioner, I find it necessary to reproduce the relevant excerpts from her written ruling. The learned judicial commissioner made the following observation at the outset:

> It is to be observed that the prayers on the striking out of the pleadings are identical to that found in the earlier application for striking out and I am at loss as to why there is any compelling need or any need at all to file two applications for the same reliefs for it served no purpose other than to confuse and add on to the cost of the proceedings.
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> ... I agree with Mastika Jaya's counsel that there is clearly duplicity and multiplicity in the first application for striking out and the present application before me.
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> ... I am not amused by being bombarded with unnecessary prayers especially when, with a little bit of patience, the earlier application will run its own course.
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> ... I agree therefore that the inclusion of the prayers on the striking out is bad for duplicity.

[5] She then proceeded to rule as follows:

> I would therefore allow the application to have it set aside but would in view of the earlier filing of Encl. 7 for striking out dismiss the similar prayers in this application.

[6] Counsel for plaintiff argued that the instant striking out application is *res judicata* because of the above holding of the learned judicial commissioner. Chong Siew Fai CJ in the oft-quoted case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 distilled the law on the principle of *res judicata* as follows:

A What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem* judicature. When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept B it as the truth; *res judicata pro veritate accipitur*.

[7] The excerpts that I cited from the judgment of the learned judicial commissioner leads to the irresistible conclusion that the prayers sought in this application were not adjudicated. She clearly C said that the defendant should not have included the striking out prayer in the application for setting aside judgment in default as the same had been included in the instant application. She found that this amounted to duplicity of proceedings. Therefore, she dismissed the striking out prayer. In view of her observation that this enclosure would be heard in due course and her direction to fix it D for hearing before me after she set aside the judgment in default, it is as plain as pike staff that she declined to adjudicate on the striking out prayer. The striking out prayer was therefore not adjudged in that proceeding. In the premises, there is no justification for the argument that the matter is *res judicata*. Even if E the defendant had submitted that the matter is *res judicata*, because it properly belonged to the subject matter of the setting aside application, I would have no hesitation in dismissing this argument. The issues in a setting aside application are whether:

F (a) a judgment is irregular; and

(b) if it is regular, whether it discloses a defence on the merits.

[8] Therefore, it cannot be argued that the striking out prayer of the defendant "belonged" to the setting aside application. In the G premises, the submission of counsel for plaintiff that the instant application should be dismissed on the ground of *res judicata* is without merit.

Striking Out Application

H **[9]** The defendant has applied to strike out the suit of the plaintiff on numerous grounds. In summary they are as follows:

(a) That a contract of retainer under s. 15 of the Sarawak Advocates Ordinance should been in writing.

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(b) That the agreement was champertous.

(c) That there is duplicity because the defendant is claiming for balance fees in Originating Summons 24-395-2009-II and that the plaintiff could have pursued this claim in that action.

(d) That this application is a collateral attack on the judgment of Justice Linton Albert who dismissed the injunction application.

(e) That an advocate is clothed with immunity in the performance of his professional duties.

(f) That there is a double claim as the plaintiff is still claiming the sum of RM795,903.73 against his former business associates.

(g) That the retainer was between the plaintiff and the law firm of Thomas, Shankar and Co. Advocates and not with the defendant.

(h) That duty of care was not pleaded.

Claim For Refund Of RM200,000

[10] Section 15 of the Advocates Ordinance (Sarawak Cap 110) reads as follows:

> No agreement entered into by any advocate ... with any person retaining or employing him, respecting the amount and manner of payment for the whole, or any part of, any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such advocate, shall be valid unless it is made in writing signed by such person.

[11] The defendant has exhibited the written retainer that was signed by the director of the plaintiff, one Jeffery Law. The document refers to the work that defendant was to undertake in prosecuting the suit on behalf the plaintiff. In respect of fees, it states at para. 5 as follows:

> 5. As for Paragraph 3.1 above (1st Major Stage our Professional fees and charges are an initial non-refundable fee of RM200,000 with the following further fees at appropriate stages:

[12] The point to note in the above paragraph is that the fee of RM200,000 is not contingent on the outcome of the litigation. The words of the above-cited paragraph are categorical and unequivocal in respect of the immediate and outright entitlement of Thomas,

Shankar and Co. Advocates to the fee of RM200,000 upon acceptance of the brief. However, the plaintiff has pleaded that the fee of RM200,000 is subject to the defendant being successful in obtaining the interlocutory injunction in question. The plaintiff's director deposed that an oral collateral representation was made to that effect. Therefore, the plaintiff's case for refund of the RM200,000 is dependent on the validity of this oral contract. The defendant has argued that this oral contract has contravened s. 15 of the Advocates Ordinance. He also submitted that s. 92 of the Evidence Act 1950 bars the admission of such evidence to contradict a written agreement. In my opinion, the clear words of s. 15 read together with written retainer are sufficient to conclude the case against the plaintiff. Section 15 enacts that an agreement in respect of fees payable to an advocates must be in writing in order to be valid. In the instant case, the written retainer (SR1) exhibited by the defendant in the affidavit in support, is evidence of such an agreement. SR1 is not alleged to be a forgery by the plaintiff. However, the plaintiff is relying on a collateral oral agreement which is invalid under s. 15. The further point to note is that s. 92(d) of the Evidence Act 1950 bars the admission of oral evidence to contradict an agreement that is required by law to be in writing. Since s. 15 provides that agreement in respect of fees between a client and an advocate must be in writing, no useful purpose would be served by allowing the plaintiff to go to full trial and attempt to adduce evidence of the oral contract. On this ground alone, the claim of the plaintiff should be struck out.

[13] I will now consider the ground that the purported oral agreement if any is champertous and illegal. This argument is premised on the allegation of the plaintiff that the defendant is not entitled to the fee of RM200,000 unless the application for interlocutory injunction was successful. In the case of *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd And Another* [2007] 1 SLR 9, the Singapore Court of Appeal said as follows in respect of the doctrine of champerty:

> As *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Singapore and Malaysian [*1001] Ed, 1998) put it at p 639, champerty exists where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. Public policy is offended by such an agreement because of its tendency to pervert the due course of justice. In *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 Lord Denning explained this public policy in the following oft cited passage at 219-220:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law.

[14] Under s. 112 of the Legal Profession Act, 1976 which is applicable in West Malaysia, no advocate shall enter into any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding. There is no similar provision in the Sarawak Advocate Ordinance. However, the common law definition of champerty includes such agreements. In *Re Attorney And Solicitor Act 1870,* [1875] CH 573 (cited in *Mokhtar Ngah & Co lwn. Yee Seng Plantations Sdn Bhd* [2009] 10 CLJ 348), Jessel MR said that a statutory provision that invalidated any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding is meant to provide against champerty (see also *Aratra Potato Co Ltd v. Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695 and *Wallersteiner v. Moir (No 2)* [1975] QB 373 that were cited by counsel for defendant). Maintenance and champerty are not actionable torts in England since 1997. However they can still be applied to declare an agreement void on the ground of public policy (see the judgment of James Foong FCJ in *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2006] 2 CLJ 358). As a champertous agreement, the alleged oral agreement is illegal and against public policy. Therefore, the plaintiff in this case cannot maintain this action. On this ground as well it is pointless to allow the case to go to a full trial as the plaintiff would not be able to enforce the so called oral collateral agreement even if it is proved.

Claim For The Sum Of RM795,903.73

[15] This amount represents the claim of the plaintiff against their former business associates in Suit No. 22-133-2009-I. The interlocutory injunction application by the plaintiff had been dismissed. However, the suit itself is pending. The plaintiff has alleged professional incompetence against the defendant. Even if for sake of argument, incompetence is proved against the defendant, the claim is premature and speculative as the said suit is still pending. It would also amount to a double claim on the part of the plaintiff.

[16] In view of my findings above, I find it unnecessary to consider all the other grounds raised by the defendant. The defendant also sought for an order for the balance of the fees purportedly due. However, he did not file a counter claim in his statement of defence. Therefore, this claim cannot be considered.

[17] In conclusion, I rule that the alleged oral collateral agreement (even if proven) is illegal as it contravenes s. 15 of the Sarawak Advocates Ordinance. I also find that it is a champertous agreement as payment of fee is contingent upon success in the litigation. Therefore, the said agreement is unenforceable. In the premises, I shall strike out the claim of the plaintiff. Order in terms of prayer (1). Costs to be taxed unless otherwise agreed.